



22 CFR Part 135

[Public Notice: 11720]

RIN 1400-AF52

Implementation of HAVANA Act of 2021

AGENCY: Department of State.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule provides implementation by the Department of State (the Department) of the HAVANA Act of 2021. The Act provides authority for the Secretary of State and other agency heads to provide payments to certain individuals who have incurred qualifying injuries to the brain. This rule covers current and former Department of State employees, and dependents of current or former employees.

DATES: *Effective date:* This interim final rule is effective [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment due date: The Department of State will accept comments on this interim final rule until [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may submit comments by one of the following methods:

- Email: AHIRule@state.gov with the subject line, HAVANA ACT RULE.
- Internet: At www.Regulations.gov, search for this document using Docket DOS–2022-0016.

Note that all submissions to [regulations.gov](https://www.Regulations.gov) are public, and the Department cannot edit the comments to remove personal information. If you have any concern about your comment being viewed by the public, please use the email option above.

FOR FURTHER INFORMATION CONTACT: Susan Ware Harris, Senior Advisor, Health Incidents Response Task Force HARuleInfo@state.gov.

SUPPLEMENTARY INFORMATION: This rule implements the HAVANA Act of 2021, P.L. 117-46, codified in 22 U.S.C. 2680b(i).

Background and Authority - § 135.1

On December 20, 2019, Congress gave authority (Public Law 116-94, Division J, Title IX, section 901) (codified in 22 U.S.C. 2680b) to the Department of State to pay benefits to employees and their dependents for injuries suffered in Cuba or China after January 1, 2016, in connection with certain hostile or other incidents designated by the Secretary of State. These benefits were limited to State Department employees only (*i.e.* not other employees under Chief of Mission (COM) authority). The Department implemented this authority in the Foreign Affairs Manual (FAM), 3 FAM 3660.

On January 1, 2021, Congress amended this law (Pub. L. 116–283, div. A, title XI, section 1110), authorizing other federal government agencies (such as the Department of Agriculture) to provide benefits to their own employees under COM authority who suffered similar injuries.

On October 8, 2021, the “Helping American Victims Affected by Neurological Attacks” (HAVANA) Act of 2021 became law (Public Law 117-46). In this latest Act, Congress authorized federal government agencies to compensate affected current employees, former employees, and their dependents for qualifying injuries to the brain. This law requires the Department (and other agencies) to “prescribe regulations” implementing the HAVANA Act not later than 180 days after the effective date of the Act. Section 3 of the HAVANA Act of 2021 removed the requirement in Public Law 116-94, Division J, Title IX, Section 901, that the qualifying injury occur in “the Republic of Cuba, People’s Republic of China, or other foreign country designated by the Secretary of State” for the purpose of making a payment under the HAVANA Act. This interim final rule only implements the HAVANA Act of 2021.

The regulation herein applies only to current and former employees of the Department of State, and dependents of current or former employees, as defined in § 135.2 of this rule.

(Current employees will also continue to be covered by 3 FAM 3660 and its subchapters.) Upon publication of this rule, the Department will add a new subsection in 3 FAM 3660. It is the Department's position that each federal agency seeking to provide benefits to an employee, former employee, or dependent of a current or former employee must implement its own authorizing regulations.

Definitions - § 135.2

The rule follows the definitional template provided in the HAVANA Act and its predecessors. The rule defines certain categories of individuals as employees (and thus covered under the Foreign Affairs Manual), as well as those who are not considered employees.

With respect to covered employees, this rule maintains the previous statutory requirement that the qualifying injury occurred on or after January 1, 2016. Similarly, with respect to dependents, this rule maintains the previous statutory requirement that the qualifying injury occurred on or after January 1, 2016, while the employee sponsor was a covered employee of the Department of State. Since geographical restrictions have been removed by the HAVANA Act for the purpose of making a payment under the Act, this rule defines "covered dependent" as any family member of a Department current or former employee, without any restriction on where the Department employee was posted. The rule uses the Department's definition of "eligible family member" in 14 FAM 511.3 to define "dependent", as set out below.

The term "covered employee" captures Department of State Foreign Service Officers; Department of State Foreign Service Specialists; Department of State Civil Service employees; Consular Affairs – Appointment Eligible Family Member Adjudicator positions; Expanded Professional Associates Program members; Family Member Appointments; Foreign Service Family Reserve Corps; employees on Limited Non-Career Appointments, ; Temporary Appointments; personnel hired on a Personal Services Contract; and Locally Employed Staff, whether employed on a Personal Services Agreement, Personal Services Contract, or appointed to the position.

The term “covered individual” captures any former employee of the Department (including retired or separated employees) who, on or after January 1, 2016, became injured by reason of a qualifying injury to the brain while they were a covered employee of the Department.

The term “covered dependent” captures a family member of a Department current or former employee who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain while the dependent’s sponsor was a covered employee of the Department. For purposes of determining whether someone is a covered dependent, the term “family members” includes unmarried children under 21 years of age (or certain other children); parents; sisters and brothers; and spouse. Step-parents and step-siblings are included in the definition.

The definition of “qualifying injury to the brain” is based on current medical practices related to brain injuries. Further, the injury must have occurred in connection with certain hostile acts, including war, terrorist activity, or other incidents designated by the Secretary of State, and must not have been the result of the willful misconduct of the covered individual. The individual must have: an acute injury to the brain such as, but not limited to, a concussion, penetrating injury, or as the consequence of an event that leads to permanent alterations in brain function as demonstrated by confirming correlative findings on imaging studies (to include computed tomography scan (CT), or magnetic resonance imaging scan (MRI)), or electroencephalogram (EEG); or a medical diagnosis of a traumatic brain injury (TBI) that required active medical treatment for 12 months or more; or acute onset of new persistent, disabling neurologic symptoms as demonstrated by confirming correlative findings on imaging studies (to include CT, MRI), EEG, physical exam, or other appropriate testing, and that required active medical treatment for 12 months or more.

In developing this definition, the Department consulted with the chief medical officers at other Federal agencies, and experts at civilian medical centers of excellence. There is no ICD-10 diagnostic code or criteria for AHIs (International Classification of Diseases, Tenth Revision, Clinical Modification (ICD-10-CM)). Because of the varied symptoms and still-nascent

understanding of how to test or otherwise screen for AHI impacts, the Department sought to establish a standard that it believes will be broadly inclusive of the types of injuries that have been reported by covered individuals to date.

The first component of the definition in § 135.2 “Qualifying injury to the brain” (paragraph (2)(a)) accounts for a variety of observable impacts to an individual, including either a concussion, a penetrating injury, or absent either of those, the ability of an ABPN-certified neurologist to review one of a variety of forms of medical imaging evidence indicating permanent alterations in brain function. The Department’s goal with this standard is to ensure there is some documented evidence of impact to the brain, while minimally circumscribing what that impact entails. The second and third components of the definition (paragraphs (2)(b) and (c) of the definition), only one of which must be satisfied, are intended to provide multiple avenues for demonstrating sustained, long-term impact to the individual. The Department believes that this benefit is intended for individuals who experience long-term consequences, potentially to include their inability to gainfully work, as a result of their reported possible AHI. Establishing a 12-month threshold of active medical treatment is indicative of a long-term injury. For example, the CDC broadly defines chronic diseases “as conditions that last 1 year or more and require ongoing medical attention or limit activities of daily living or both.”

The Department notes that in adopting this definition, there may be eligible applicants who have suffered kinetic or external, physically-caused injuries to the brain such as the head being struck by an object, the head striking an object, the brain undergoing an acceleration or deceleration movement, or forces generated from events such as a blast or explosion, including penetrating injuries, if their injuries satisfy the other requirements of this rule.

The American Board of Psychiatry and Neurology (ABPN) remains the sole neurology board in the United States, maintaining strict professional requirements for membership. As such, the Department of State endorses this industry certification as the clinical standard for a neurologist upon evaluation of a qualifying injury to the brain.

The definition of “other incident” is a new onset of physical manifestations that cannot otherwise be explained. The Department notes that it maintains a non-public list of potential incidents based on internal reports it has collected from personnel and their dependents since 2016. While the Department believes this list to be reflective of known incidents to-date, the Department will work with any requestor upon submission of the DS-4316 (“Eligibility Questionnaire for HAVANA Act Payments”) to determine whether or not their alleged incident aligns with the Department’s record of “other incidents.”

Eligibility for Payments - §135.3

The Department will communicate with its entire workforce to inform them of the rule, regulations, and process for requesting payment. The Department will work together with potential recipients to provide the necessary documentation to qualify for payment. In the majority of cases, potentially affected personnel are already known to the Department due to internal reporting after individuals experienced what they believe to be an AHI. While the Department believes these efforts will ensure all potential requestors will be able to identify themselves to the Department and begin the process of requesting a payment, the DS-4316, the form associated with developing the necessary evidence to submit a claim, will also be publicly hosted on State’s eForms website with instructions on how to contact the Department if a requestor believes they are eligible for a HAVANA Act payment.

Section 135.3 states the conditions required before the Department will consider discretionary payments to former employees and dependents of current or former employees: the qualifying injury to the brain for a former employee must have occurred on or after January 1, 2016, and while the former employee was a covered employee of the Department; and for a dependent, the injury must have occurred on or after January 1, 2016, and while the dependent’s sponsor was a covered employee of the Department. The Under Secretary for Management must approve any HAVANA Act payment.

As noted above, any payment to current Department employees will be processed using the procedures in 3 FAM 3660 and its subchapters.

Payments will be a one-time, non-taxable, lump sum payment, based on Level III of the Executive Schedule (see 5 U.S.C. 5311 et seq.). The payment is non-taxable pursuant to 22 U.S.C. 2680b(g). As indicated in § 135.3(e), in determining the amount of the payment, the Department will consider (1) the responses on the DS-4316, “Eligibility Questionnaire for HAVANA Act Payments” and (2) whether the Department of Labor (Workers’ Compensation) has determined that the requestor has no reemployment potential, or the Social Security Administration has approved the requestor for Social Security Disability Insurance, or the requestor’s ABPN-certified neurologist has certified that the individual requires a full-time caregiver for activities of daily living, as defined by the Katz Index of Independence of Daily Living.

The award thresholds are based on Level III of the Senior Executive Schedule (SES). Base will be 75 percent of Level III pay, and Base+ will be 100 percent of Level III pay. If the requestor meets any of the criteria listed in (e) (2) above, the requestor will be eligible to receive a Base+ payment. Requestors whose neurologists confirm that the definition of “qualifying injury to the brain” has been met but have not met any of the criteria listed in (e) (2) above, will be eligible to receive a Base payment. The criteria established in (e)(2) are reflective of the Department’s objective of ensuring that the individuals most severely affected by AHIs (as indicated by a lack of reemployment potential, an inability to engage in substantial gainful activity, or the need for a full-time caregiver) receive additional payment. The specific use of the Department of Labor (DOL) or the Social Security Administration’s (SSA) determination is to ensure that both federal employees as well as covered individuals and covered dependents have access to a mechanism for this determination. The Department recognizes that criteria DOL and SSA use in their disability determinations are distinct, as well as the fact that the procedural timelines for seeking and receiving approval may be different between these agencies. The third

option, that an ABPN-certified neurologist certifies that the individual requires a full-time caregiver for activities of daily living (as defined by the Katz Index of Independence of Daily Living), provides an alternative mechanism for all individuals. Finally, the Department notes that if a requestor who received a Base payment later meets any of the criteria listed in (e) (2) above, the requestor may apply for an additional payment that will be the difference between the Base and Base+ payment. At the time of writing this rule (2022), a Base payment will be \$140,475. A Base+ payment will be \$187,300. As the payments are tied to the SES, the amounts will change over time based on increases to the Federal salary schedule.

The specific use of Level III of the SES sets the compensation at the maximum annual salary potentially available to most of the federal workforce. While payments under the HAVANA Act may be on top of other leave, disability, or workers' compensation payments the requestor is receiving or may be entitled to receive that also help augment any loss of income, the Department believes this is an appropriate additional payment. The Department also believes this amount is the most it can reasonably compensate each requestor while ensuring available funds for the total amount of requestors it believes will likely receive payments. The Department also notes that because payments are contingent on appropriated funds all payments will be paid out on a first come, first served basis.

Consultations with other agencies - § 135.4

The Department of State will, to the extent possible, consult with the appropriate officials in other agencies to help identify personnel (current or former employees, or dependents) who served under Chief of Mission authority overseas and who might have suffered a qualifying injury to the brain on or after January 1, 2016. It will be the responsibility of the other agencies to publish regulations implementing the HAVANA Act and to provide payment for individuals affiliated with such agencies.

Regulatory Analysis

Administrative Procedure Act

This rule is being published as an interim final rule. Because this rule is a matter relating to public benefits, it is exempt from the requirements of 5 U.S.C. 553. *See* 5 U.S.C. 553(a)(2). Since the rule is exempt from the entirety of § 553 pursuant to § 553(a)(2), the provisions of §553(d) do not apply and the rule could be in effect upon publication. However, the Department has determined it will set an effective date of 45 days after publication. In addition, it is in the public interest for the rule to have an expeditious effective date. However, the Department is seeking comment from interested persons on the provisions of this Rule and will consider all relevant comments in determining whether additional rulemaking is warranted under the provisions of the HAVANA Act.

Congressional Review Act

The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has determined that this rule is not a major rule as defined by 5 U.S.C. 804 for the purposes of Congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801-808).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million in any year; and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Regulatory Flexibility Act: Small Business

The Department of State certifies that this rulemaking will not have an impact on a substantial number of small entities. A regulatory flexibility analysis is not required under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*).

Executive Order 12866 and Executive Order 13563

The Department of State has provided this interim final rule to OMB for its review. OIRA has designated this rule as “significant” under Executive Order 12866. Potential causes of AHI are being investigated but remain unknown. Given the nature of the incidents, it is difficult to accurately estimate future incidents and numbers of individuals affected. For Fiscal Year (FY) 2022, the Department has estimated that it would pay up to \$5.6 million to 40 people. For FY 2023, the estimated numbers are up to \$10.7 million to 76 people.

The Department has also reviewed the rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and finds that the benefits of the rule (in providing mechanisms for individuals to obtain compensation for certain injuries) outweigh any costs to the public, which are minimal. The Department of State has also considered this rulemaking in light of Executive Order 13563 and affirms that this proposed regulation is consistent with the guidance therein.

Executive Order 12988

The Department of State has reviewed this rule in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Orders 12372 and 13132

This rule will not have substantial direct effect on the states, on the relationships between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. Executive Order 12372,

regarding intergovernmental consultation on federal programs and activities, does not apply to this regulation.

Paperwork Reduction Act

This rulemaking is related to an information collection for the Form DS-4316, “Eligibility Questionnaire for HAVANA Act Patients,” OMB Control Number 1405-0250. This collection was approved under an emergency authorization. The Form DS-4316 has been uploaded to this rule’s docket on Regulations.gov (please see “ADDRESSES” section above). The Department invites public comment on the form and on the anticipated burden associated with it. The Department is pursuing a routine three-year approval from OIRA, including an intent to publish 60- and 30-day *Federal Register* notices for public comment.

List of Subjects in Part 135

Government employees; federal retirees; health care

Accordingly, for the reasons stated in the preamble, the Department of State adds part 135 to Subchapter N of Title 22, Code of Federal Regulations, to read as follows:

PART 135 – IMPLEMENTATION OF THE HAVANA ACT OF 2021

Sec.

135.1 Authority.

135.2 Definitions.

135.3 Eligibility for payments by the Department of State.

135.4 Consultation with other agencies.

Authority: 22 U.S.C. 2651a; 22 U.S.C. 2680b.

§ 135.1 Authority.

(a) Under section 3 of the HAVANA Act of 2021 (Public Law 117-46), codified in 22 U.S.C. 2680b(i), the Secretary of State or other agency heads may provide a payment for a qualifying injury to the brain to a covered employee or covered dependent, who incurred a

qualifying injury to the brain on or after January 1, 2016. The authority to provide such payments is at the sole discretion of the Secretary or their designee.

(b) These regulations are issued in accordance with 22 U.S.C. 2680b(i)(4) and also apply to former covered employees of the Department of State and their covered dependents.

(c) For current employees of the Department of State (hereinafter, “the Department”), applicable procedures are located in the Foreign Affairs Manual (3 FAM 3660 and its subchapters).

§ 135.2 Definitions.

For purposes of this part, the following definitions apply:

Covered employee. (1) An employee of the Department who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain.

(2) The following are considered employees of the Department (see procedures in 3 FAM 3660 and its subchapters) for the purposes of this rule: Department of State Foreign Service Officers; Department of State Foreign Service Specialists; Department of State Civil Service employees; Consular Affairs – Appointment Eligible Family Member Adjudicator positions; Expanded Professional Associates Program members; Family Member Appointments; Foreign Service Family Reserve Corps; employees on Limited Non-Career Appointments; Temporary Appointments; personnel on a Personal Services Contract; and Locally Employed Staff, whether employed on a Personal Services Agreement, Personal Services Contract, or appointed to the position.

(3) The following are not considered employees of the Department for purposes of these regulations (see §135.4): employees or retired employees of other agencies.

Covered dependent: A family member of a Department current or former employee who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain while the dependent’s sponsor was a covered employee of the Department.

Covered individual: A former employee of the Department who, on or after January 1, 2016, becomes injured by reason of a qualifying injury to the brain while they were a covered employee of the Department.

Family member: For purposes of determining “covered dependent”, a family member is defined as follows:

(1) Children who are unmarried and under 21 years of age or, regardless of age, are unmarried and due to mental and/or physical limitations are incapable of self-support. The term “children” must include natural offspring, step-children, adopted children, and those under permanent legal guardianship (at least until age 18), or comparable permanent custody arrangement, of the employee or spouse or domestic partner (as defined in 3 FAM 1610) when dependent upon and normally residing with the guardian or custodial party, and U.S. citizen children placed for adoption if a U.S. court grants temporary guardianship of the child to the employee and specifically authorizes the child to reside with the employee in the country of assignment before the adoption is finalized;

(2) Parents (including stepparents and legally adoptive parents) of the employee or of the spouse or of the domestic partner as defined in 3 FAM 1610.

(3) Sisters and brothers (including stepsisters or stepbrothers, or adoptive sisters or brothers) of the employee, or of the spouse when such sisters and brothers are at least 51 percent dependent on the employee for support, unmarried and under 21 years of age, or regardless of age, are physically and/or mentally incapable of self-support; and

(4) Spouse.

Qualifying injury to the brain. (1) The injury must have occurred in connection with war, insurgency, hostile act, terrorist activity, or other incidents designated by the Secretary of State, and that was not the result of the willful misconduct of the covered individual; and

(2) The individual must have:

(i) An acute injury to the brain such as, but not limited to, a concussion, penetrating injury, or as the consequence of an event that leads to permanent alterations in brain function as demonstrated by confirming correlative findings on imaging studies (to include computed tomography scan (CT), or magnetic resonance imaging scan (MRI)), or electroencephalogram (EEG);

(ii) A medical diagnosis of a traumatic brain injury (TBI) that required active medical treatment for 12 months or more; or

(iii) Acute onset of new persistent, disabling neurologic symptoms as demonstrated by confirming correlative findings on imaging studies (to include CT, MRI), EEG, physical exam, or other appropriate testing, and that required active medical treatment for 12 months or more.

Other incident: A new onset of physical manifestations that cannot otherwise be readily explained.

§ 135.3 Eligibility for payments by the Department of State.

(a) The Department of State may provide a payment to covered individuals, as defined herein, if the qualifying injury to the brain was assessed and diagnosed in person by a currently board-certified neurologist from the American Board of Psychiatry and Neurology (ABPN), occurred on or after January 1, 2016, and while the individual was a covered employee of the Department.

(b) The Department of State may provide a payment to covered employees, as defined herein, if the qualifying injury to the brain was assessed and diagnosed in person by a currently board-certified neurologist from the American Board of Psychiatry and Neurology (ABPN), occurred on or after January 1, 2016, and while the employee was a covered employee of the Department.

(c) The Department of State may provide a payment to a covered dependent, if the qualifying injury to the brain was assessed and diagnosed in person by a currently board-certified neurologist from the American Board of Psychiatry and Neurology (ABPN), occurred on or after

January 1, 2016, and the dependent's sponsor was a covered employee of the Department at the time of the dependent's injury.

(d) Payment for a qualifying injury to the brain will be a non-taxable, one-time lump sum payment.

(e) The Department will determine the amount paid to each eligible person based on the following factors:

(1) The responses on the DS-4316, "Eligibility Questionnaire for HAVANA Act Payments"; and

(2) Whether the Department of Labor (Workers' Compensation) has determined that the requestor has no reemployment potential, or the Social Security Administration has approved the requestor for Social Security Disability Insurance, or the requestor's ABPN-certified neurologist has certified that the individual requires a full-time caregiver for activities of daily living, as defined by the Katz Index of Independence of Daily Living.

(3) The award thresholds are based on Level III of the Senior Executive Schedule: Base will be 75 percent of Level III pay, and Base+ will be 100 percent of Level III pay. If the requestor meets any of the criteria listed in paragraph (e)(2) of this section, the requestor will be eligible to receive a Base+ payment. Requestors whose neurologists confirm that the definition of "qualifying injury to the brain" has been met but have not met any of the criteria listed in paragraph (e)(2) of this section, will be eligible to receive a Base payment. If a requestor who received a Base payment later meets any of the criteria listed in paragraph (e)(2) of this section, the requestor may apply for an additional payment that will be the difference between the Base and Base+ payment.

(f) The Under Secretary of State for Management may approve payments under the rule. The Bureau of Global Talent Management (GTM) will notify individuals of the decision in writing.

(g) An appeal of a decision made by the Under Secretary of State for Management may be directed to the Deputy Secretary of State for Management and Resources in writing. The Deputy Secretary of State for Management and Resources is the final appeal authority. GTM will notify individuals of the decision in writing.

§135.4 Consultation with other agencies.

(a) The Department of State will, to the extent possible, consult with the appropriate officials in other federal agencies to identify their current and former covered employees, and current and former dependents who reported an anomalous health incident while working under Chief of Mission authority. This consultation is solely to assist the other agencies in determining who might be initially eligible for payment under the HAVANA Act. The Department of State will not process payment for employees, former employees, or dependents of current or former employees of other agencies.

(b) Under the HAVANA Act, the heads of other employing federal agencies are responsible for prescribing regulations to carry out the HAVANA Act, including regulations for approving any payment.

Kevin E. Bryant,
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